

STATE OF MICHIGAN
COURT OF APPEALS

CLARA S. RUSSO and THOMAS RUSSO,

Plaintiffs-Appellants,

v

NORFOLK SOUTHERN RAILWAY
COMPANY, a/k/a NORFOLK SOUTHERN
COMPANY,

Defendant-Appellee.

UNPUBLISHED

June 13, 2006

No. 266922

Monroe Circuit Court

LC No. 02-015327-CH

Before: Smolenski, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Plaintiffs own a parcel of rural farmland purchased in 1972 that is bounded on the west by property owned by defendant over which an active railway operates. When plaintiffs purchased the parcel it was served by a private grade crossing, maintained by defendant, providing access over the railroad track to Hull Road, which runs just west of the track. In 2001, however, defendant removed the crossing while rebuilding the track and elected not to restore it, citing safety concerns and the fact that plaintiffs were able to access their property from a driveway that did not cross over a railway. Plaintiffs filed this suit alleging that defendant was in breach of a covenant dating back to 1854, which contained a promise to maintain a crossing at this location. Defendant responded that no such covenant was made, and therefore it was not obligated to maintain the crossing. The trial court granted defendant's motion for summary disposition, concluding that the railroad's source deed did not contain a covenant requiring defendant to maintain the crossing.

On appeal, plaintiffs argue that the trial court erred by ruling solely on the basis of a breach of covenant claim, arguing that their complaint also stated a claim for an easement by necessity. We disagree.

This Court reviews de novo a trial court's decision to grant or deny summary disposition. *Spiek v Michigan Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When reviewing a grant of summary disposition under MCR 2.116(C)(10), this Court must consider the pleadings, affidavits, depositions, and other documentary evidence presented to the trial court in

the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). A trial court's decision concerning the scope and meaning of the pleadings, however, will be reversed only if it constitutes an abuse of discretion. *Smith v Stolberg*, 231 Mich App 256, 259; 586 NW2d 103 (1998), citing *Dacon v Transue*, 441 Mich 315, 328; 490 NW2d 369 (1992).

Plaintiffs' complaint does not refer to an easement by necessity, nor did they argue to the trial court that they were making a claim based on an easement by necessity. Instead, their complaint alleged a breach of covenant. On appeal, however, plaintiffs argue that the facts alleged in their complaint were sufficient to maintain a cause of action for an easement by necessity. Specifically, plaintiffs point to allegations in their complaint that defendant rendered plaintiff landlocked when it closed the grade crossing. However, the allegation that defendant rendered plaintiffs' property landlocked is not alone sufficient to state a claim for an easement by necessity, which requires proof of necessity at the time of the original conveyance. Further, it does not provide adequate notice to defendant that it would be called on to defend such a claim. See *Dacon*, *supra* at 329.¹

Even if the trial court had addressed this issue, the record reveals that plaintiffs cannot successfully state a claim for an easement by necessity. To claim an easement by necessity, the party asserting the easement must demonstrate that the property was split in a manner that left one of the parcels landlocked without access across the other parcel. See *Chapdelaine v Sochocki*, 247 Mich App 167, 172; 635 NW2d 339 (2001). An easement is implied based on the presumed intent of the parties at the time of the original conveyance. *Id.* at 173; see also *Rannels v Marx*, 357 Mich 453, 458; 98 NW2d 583 (1959) (observing that "an easement is held to exist by implication because of the obvious intention of the parties"). Finally, an easement by necessity is not a "perpetual right." *Waubun Beach Ass'n v Wilson*, 274 Mich 598, 609; 265 NW 474 (1936). Rather, it ceases to exist if the owner of the dominant estate acquires an alternative way to access the property, even if the former way of necessity is more convenient. *Id.* at 608, 611. Here, plaintiffs' complaint did not allege that the original conveyance left the parcel landlocked, and thus plaintiffs did not adequately allege easement by necessity. Additionally, even if an easement by necessity existed at this location at the time of the original conveyance, it was extinguished when plaintiffs acquired property south of Laplaisance Creek that provides access to Albain Road. *Waubun Beach*, *supra*.

Plaintiffs' final argument on appeal is that the trial court erred when it granted summary disposition in favor of defendant on plaintiffs' breach of covenant claim. We disagree.

Plaintiffs assert that the deed granting the land in question to Thomas Cole in 1854 reserved a right of way for plaintiffs' predecessors in interest and their assigns. The deed on which they rely, however, is for another parcel of land located south of their property. That deed transferred a strip of land 30 feet wide which was bordered on the north by Laplaisance Creek

¹ We also take note that plaintiffs were twice afforded the opportunity to file an amended complaint, but chose never to do so.

and extended south to the town line. The plaintiffs' 11.171 acre parcel, and the crossing at issue, are located north of Laplaignance Creek.

As for the property in issue, Cole did not acquire a strip of land running through the seller's property. Instead, he purchased the entire parcel, which was described as "ten acres more or less." The seller did not retain any property surrounding the land that Cole purchased from him. This provides a reasonable explanation for why the deed did not contain a promise to maintain a crossing and a fence like that found in the deed for the 30-foot strip of land.

Although plaintiffs dispute whether the railroad's source deed is controlling, they have failed to submit any evidence that it is incomplete or inaccurate. Plaintiffs argue that there are two separate documents relating to this parcel of property, thus creating an ambiguity that must be resolved with reference to the intent of the parties to the original conveyance. This argument, however, is based on a factual assertion that is unsupported by the evidence. There is only one document relating to the transfer of this particular parcel to Cole, which is the source deed offered by the railroad.

In construing a deed of conveyance, the fundamental inquiry is the intent of the parties as manifested in the language of the deed. *Dep't of Natural Resources v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 370; 699 NW2d 272 (2005). In the absence of ambiguous language, the court will not consider extrinsic evidence to ascertain the intent of the parties. *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 49; 700 NW2d 364 (2005); *Farabaugh v Rhode*, 305 Mich 234, 240; 9 NW2d 562 (1943). In this case, there is no ambiguity in the deed that would justify considering extrinsic evidence of the parties' intent. See *Thomas v Jewell*, 300 Mich 556, 559; 2 NW2d 501 (1942) (discussing the general rule that the primary object in interpreting deeds is to determine the intention of the parties from the instrument itself). Because the source deed is unambiguous and does not grant a right of way at this location, the trial court correctly granted defendant's motion for summary disposition.

Affirmed.

/s/ Michael R. Smolenski
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray